

# DENATIONALISING PRIVATE INTERNATIONAL LAW – A LAW WITH MULTIPLE ADJUDICATORS AND ENFORCERS

Diego P. FERNÁNDEZ ARROYO\*

- I. The Erosion of State-Centrism in PrIL
- II. Current Significance of Non-State Adjudication and Enforcement
  - A. Adjudication in Public Settings
    - 1. International Courts
    - 2. Human Rights Courts
    - 3. REIO Courts
  - B. Private Adjudication and Private Enforcement
    - 1. Arbitration
    - 2. Private Enforcement
- III. Impact of Denationalisation of Adjudicative Power
  - A. Insufficiency of State Adjudication
    - 1. The Shift of Jurisdictional Rationale in PrIL
    - 2. The Attempt to Replicate Private Adjudication in State Courts
  - B. Dependence on Heteronomous Courts
    - 1. State Courts within a Complex Jurisdictional Framework
    - 2. Different Degrees of Dependence
  - C. State Adjudicators as Simple “Controllers”
    - 1. Concerning Foreign and International Courts’ Decisions
    - 2. Concerning Arbitral Awards and Private Agreements
- IV. A Word in Conclusion – Content and Teaching of PrIL

## **I. The Erosion of State-Centrism in Private International Law**

Quite evidently, and as powerful as it still may be, the State is nowadays no longer what it used to be. This finding can be confirmed from multiple perspectives. In the realm of Private International Law (PrIL), the central role once played by the State has progressively been eroded. Nevertheless, at first sight State-

---

\* Professor at Sciences Po Law School, Paris.

centrism may still appear as quite solid; repeated manifestations of exacerbated nationalism continue to stress its influence. First, the State remains the “master of the game,” as it establishes the ultimate objective of PrIL, through its policy-makers. For instance, it decides whether to establish a dualist or monist legal order, a conservative or advanced system of PrIL, to adopt an open or closed attitude vis-à-vis foreign law and foreign decisions, among other aspects. Second, the State implements its policy objectives through its law-making power, embodied in the legislators. For instance, it creates PrIL rules, or decides whether to compile those rules in a comprehensive body (like the civil code) or a standalone act. Third, the State appears also as the “referee of the game,” as it adjudicates PrIL disputes, through its courts, in order to ensure that its rules and underlying policies are duly respected. Fourth, government officials, normally from justice or foreign affairs departments, play the role of central authorities in a myriad of international conventions organizing cooperation in matters of PrIL, such as issues of procedure, family and protection of children. The influence of the State in this regard cannot be denied. Law journals are plenty of news and comments about new State codifications or State-court decisions on PrIL. Accordingly, any discourse on PrIL “beyond” or “after” the State cannot look down upon these manifestations. However, neither can any such discourse be built exclusively around the State.

Indeed, the State coexists with other –public and private– actors in all of the aforementioned activities. This coexistence is for instance quite evident within the framework of the making of PrIL rules. In the last decades, there has been a notable increase in the creation of non-national rules or soft law codification (which can be characterised as “sets of principles” or, shortly, “principles”), that has given rise to a normative pluralism which, in some cases, has taken the form of truly parallel non-national legal orders.<sup>1</sup> A dense network of non-binding private and public rules is progressively gaining space.<sup>2</sup> Certainly, States retain *their* law-making power as a

---

<sup>1</sup> D.P. FERNÁNDEZ ARROYO, The Growing Significance of Sets of Principles to Govern Trans-boundary Private Relationships, in *The Age of Uniform Law – Essays in honour of Michael Joachim Bonell*, Rome 2016, p. 272 *et seq.*; J. BASEDOW, The Multiple Facets of Law Enforcement, in N. ETCHEVERRY ESTRÁZULAS/ D.P. FERNÁNDEZ ARROYO (eds.), *Enforcement and Effectiveness of the Law*, Cham 2018, p. 3 *et seq.*

<sup>2</sup> See Eric LOQUIN, Les règles matérielles internationales, *Recueil des cours* 322 (2006), p. 9 *et seq.*; G. KAUFMANN-KOHLER, La codificación y la normatividad del *soft law*

notable expression of sovereignty; they use this power on a daily basis. Equally evident is, however, the network of non-national rules applicable to trans-boundary legal relationships, set up in the last decades. So far, the experience of principle-making has been positive from several points of view. On the one hand, the principles have confirmed the denationalisation of law. More precisely, they stress the end of the State monopoly on normative production (assuming such a monopoly ever existed). Overcoming the unjustified distinction between State law and non-State law, the principles permit law to evolve in different ways, particularly in relation to the emergence of a post-post-modern private international law. On the other hand, the principles may bring court and arbitral practices closer, once the former are persuaded that there is no reason to leave the monopoly of application of non-State law to arbitrators.

## **II. Current Significance of Non-State Adjudication and Enforcement**

When it comes to the adjudication of PrIL disputes, the erosion of State power is evident. More precisely, what has been eroded is the “centrality” of State power in that regard. It is obvious that domestic courts are not the exclusive PrIL adjudicators. However, for quite a while they played a central adjudicative role. In fact, the enforcement of substantive rights in international cases was, for a long time, perceived as being inseparable from the activity of State courts. Evidently, such a perception could not ignore that international courts and tribunals have been dealing with PrIL issues ever since they existed. This obvious finding needs no demonstration. Nonetheless, I believe that drawing attention to certain aspects of non-State adjudication and enforcement may be useful in order to better understand the current situation of PrIL, as well as to predict its possible evolution.

---

en el arbitraje internacional, in J. BASEDOW *et al* (eds.), *¿Cómo se codifica hoy el derecho comercial internacional?*, Asuncion 2010, p. 107 *et seq.*

## A. Adjudication in Public Settings

### 1. International Courts

It is well known that the International Court of Justice (ICJ) –as well as its predecessor the Permanent Court of International Justice–<sup>3</sup> has had to cope with PrIL issues in a variety of scenarios typically related to Public International Law (PIL).<sup>4</sup> It has been suggested that the Court has been required to examine issues of PrIL in order to properly discharge its PIL function.<sup>5</sup> In other words, the Court has encountered and still encounters PrIL issues mixed with its PIL ordinary matters. Something similar may be said on the PrIL dispute-settlement activity of other international courts of “universal” scope. States are not alone as international actors; international adjudicators are also “a means to develop the law.”<sup>6</sup>

Concretely, the Court has dealt with PrIL in the following situations:<sup>7</sup>

a) There is a lacuna in PIL, capable of being filled by reference to PrIL. In these types of cases, the court borrows PrIL rules to resolve analogous PIL issues;

---

<sup>3</sup> Together mentioned hereinafter as the “Court.”

<sup>4</sup> The Court has always been taken as a PIL institution, basically pursuant to Article 34 of the ICJ Statute, which states that only States may be parties in cases before the Court. See *The Corfu Channel Case* [1949] *ICJ Rep*, p. 35: “But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty;” *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) (1926) PCIJ Ser A No 7, p. 19: “[f]rom the standpoint of International Law and of the Court which is its organ...;” *LaGrand (Germany v United States)* [2010] *ICJ Rep*, p. 466, 486; *Nottebohm (Liechtenstein v Guatemala)* (Second Phase) [1955] *ICJ Rep*, p. 420-421. See also R. KOLB, *The International Court of Justice*, Oxford 2013, p. 57; A. ZIMMERMAN *et al.*, *The Statute of the International Court of Justice*, 2<sup>nd</sup> ed., Oxford 2012, p. 731.

<sup>5</sup> T.M. DE BOER, *Living Apart Together: the relationship between public and private international law*, *NILR* 2001, p. 83.

<sup>6</sup> P. SANDS, *Reflections on International Judicialization*, *EJIL* 2017, p. 885-889 (citing H. LAUTERPATCH).

<sup>7</sup> On this, see H. VAN LOON/ S. DE DYCKER, *The Role of the International Court of Justice in the Development of Private International Law*, *Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht*, vol. 140 (*One Century Peace Palace, from Past to Present*), The Hague 2013, p. 73-119; D.P. FERNÁNDEZ ARROYO/ M.M. MBENGUE, *Public and Private International Law in International Courts and Tribunals – Evidences of an Inescapable Interaction*, *Columbia JTL* 2018, p. 797-854.

- b) The Court is required, as a prerequisite to resolving a PIL issue, to interpret a PrIL treaty or construe a PrIL concept;
- c) PIL rights and obligations flow directly from States' domestic laws regarding private international disputes;
- d) The enforcement of the State's domestic laws regarding private international disputes is challenged as infringing PIL.

Although the Court's authoritative power is remarkable, its practical significance as well as its influence is rather limited given the reduced number of cases decided by the Court.<sup>8</sup> Of course, it can be argued that most of these cases are not examples of denationalisation because, by their very nature, the problems involved therein could not be discussed before national courts. However, such an assertion precisely confirms the existence of PrIL issues which fall outside the scope of domestic courts' jurisdiction.

## **2. *Human Right Courts***

The situation has proven to be remarkably different at the regional level. The decisions of courts specialised in human rights have become both frequent and significant in matter of PrIL. The activity of the European Court of Human Rights (ECHR) has been, in this respect, particularly impressive.

The role played by human rights courts on PrIL matters has impressively grown in the last decades. This is particularly visible within the European context although it is clearly a universal phenomenon that affects all the aspects of PrIL.<sup>9</sup> The case law before the ECHR offers a variety of discussions of PrIL issues. These arise in particular with regard to Articles 6 (right to a fair trial) and 8 (respect of private and family life) of the Convention. In assessing a possible violation of these articles, the ECHR has considered a vast

---

<sup>8</sup> The activity of other international courts affecting PrIL issues may be also mentioned, for example, *The "ARA Libertad" Case (Argentina v. Ghana)*, brought before the International Tribunal for the Law of the Sea (<https://www.itlos.org/cases/list-of-cases/case-no-20/>).

<sup>9</sup> The reading of the IDI Draft Resolution on Human Rights and Private International Law is conclusive in this regard. *Ann. IDI*, Séssion de Hyderabad 2017, vol. 78, p. 215 *et seq.*, <http://www.idi-iiil.org/app/uploads/2018/12/8.-séances-plénières-Basedow.pdf>

range of PrIL issues and a variety of PrIL instruments, notably the 1980 Hague Child Abduction Convention.<sup>10</sup>

The role of the ECHR when addressing PrIL matters has been sometimes controversial. It has explained many times that its role is not to solve PrIL cases but just to evaluate the compatibility of national courts' decisions with human rights requirements. In the ECHR's own words:

It is not the Court's task to take the place of the competent authorities in examining whether there would be a grave risk that the child would be exposed to psychological harm, within the meaning of Article 13 of the Hague Convention, if he returned to Israel. However, the Court is competent to ascertain whether the domestic courts, in applying and interpreting the provisions of that Convention, secured the guarantees set forth in Article 8 of the Convention, particularly taking into account the child's best interests.<sup>11</sup>

The activity regarding PrIL issues developed by the Inter-American Court of Human Rights (IACtHR) has perhaps not been as impressive but appears equally significant. To prove this assertion it may suffice to refer to the Advisory Opinion concerning the obligations of States Parties to the American Convention on Human Rights (American Convention, ACHR) in respect of infrastructure creating a risk of significant environmental damage to the marine environment of the Wider Caribbean Region, in which, among many other interesting findings, the IACtHR affirms that the States have the duty to grant non-discriminatory access to justice to persons located outside their territory who are potentially affected by transboundary damages originating in their territory.<sup>12</sup>

### 3. *REIO Courts*

---

<sup>10</sup> See P. BEAUMONT & L. WALKER, Post *Neulinger* Case Law of the European Court of Human Rights on the Hague Child Abduction Convention in *A Commitment to private international law, Essays in honour of Hans van Loon*, Cambridge, 2013, p. 17-30.

<sup>11</sup> ECHR, *Case of Neulinger and Shuruk v. Switzerland* (Application No. 41615/07), 6 July 2010, § 141. <http://hudoc.echr.coe.int/FRE?i=001-99817>

<sup>12</sup> IACtHR, *Consultative Opinion OC-23/17*, 15 November 2017, available in Spanish at [http://www.corteidh.or.cr/docs/opiniones/seriea\\_23\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf) (see, especially §§ 238-240).

Even more conspicuous than the impact of the human rights courts on PrIL, has been the outcome of the Europeanisation of PrIL originating in the transfer of competencies from Member States to the regional structure within the European Union (EU). As a consequence of this process, the role of EU Member-State courts is, as far as PrIL is concerned, largely “dependant”<sup>13</sup> on the content of the decisions of the EU Court of Justice (EUCJ).

It is true that in the European jurisdictional system, the more commonly used mechanism is the request for preliminary ruling pursuant to Article 267 of the TFEU, according to which a court of a Member State refers to the EUCJ in order to get the authentic interpretation of a provision of EU law. Under this mechanism, the national court formally renders the concrete ultimate decision. However, the State courts (all of them, in fact) are obliged to follow the decision given by the EUCJ. The remaining issues for the State courts are the factual findings and, in given cases, the application of proportionality criteria, which do not seem so important in comparison with the power of the regional court.

Additionally, the EUCJ is also key beyond preliminary rulings, as demonstrated by the reinforcement of the exclusive external competence of the EU (and previously of the EC) on PrIL matters.<sup>14</sup> According to the EUCJ, the exclusive competence is necessary in order to avoid the risk of undermining the uniform and consistent application of EU rules and the proper functioning of the system which they establish.<sup>15</sup> Furthermore, the EU is now a party to several conventions on PrIL matters. At the same time, EU member States have ratified several conventions “in the interest of the Union.”<sup>16</sup>

---

<sup>13</sup> On the precision of the notion of “dependence” within this context, see *infra* III.B.

<sup>14</sup> See ECJ *Opinion 1/03* of 7 February 2006 (on the EC competence for concluding the new Lugano Convention on jurisdiction and the recognition and enforcement of resolutions in civil and commercial matters) and *Opinion 1/13* of 14 October 2014 (on the EU competence for accepting the accession of third States to the Hague Convention on the civil aspects of international child abduction).

<sup>15</sup> P. FRANZINA, *The External Dimension of EU Private International Law After Opinion 1/13*, Cambridge 2017.

<sup>16</sup> Although they are not comparable to the EU process, experiences in other continents are worth being cited. Within the MERCOSUR, see Advisory Opinion 1/2007, 3 April 2007, [http://www.tprmercotur.org/es/docum/opin/OpinCon\\_01\\_2007\\_es.pdf](http://www.tprmercotur.org/es/docum/opin/OpinCon_01_2007_es.pdf) (in Spanish), dealing with the application of the 1994 Buenos Aires Protocol on International Jurisdiction on Contractual Matters.

## **B. Private Adjudication and Private Enforcement**

### ***1. Arbitration***

Coming back to the realm of what could be labelled the “universal” arena, arbitral tribunals are much more active in terms of PrIL adjudication than international courts. The significance of arbitration in PrIL is not diminished by the fact it is mostly used for commercial disputes. What really matters is not only that the material scope of arbitration has gone far beyond what can be strictly considered to be commercial, but also that arbitration has become in practice the exclusive, quasi-exclusive or, at least, preferred jurisdiction for several types of international disputes. Furthermore, the enforcement of arbitral agreements and awards is largely made without the intervention of domestic courts. That is to say, there has been a shift in adjudicative power and in the way in which the final product of the exercise of that power is enforced. Additionally, we are going to see that arbitration is not the sole kind of private enforcement.

PrIL has reached the peak of private adjudication through the use of arbitration as the primary dispute resolution method for international commerce. A large part of the volume of international private disputes has moved to the realm of arbitral tribunals, where the influence and control of the State is rather weak. In a vast myriad of economic matters, the rise of international arbitration has confined State courts in the role of default courts. And, if we believe in certain audacious proposals, even that role should not be guaranteed in the future.<sup>17</sup>

When an arbitral tribunal is constituted, its jurisdiction is decided by applying the universally recognised principle of competence-competence.<sup>18</sup> If it is properly applied, either party can challenge the jurisdiction and ultimately it is a court that decides the jurisdiction of the arbitral tribunal. More precisely, the court has the last word because the principle of competence-competence is based on the priority given to the arbitral tribunal in order to avoid undue delays in arbitration. Remarkably, in the overwhelming majority of

---

<sup>17</sup> See G. BORN, *BITS, BATS and buts: reflections on international dispute resolution*, [www.wilmerhale.com/uploadedFiles/Shared\\_Content/Editorial/News/Documents/BITS-BATs-and-Buts.pdf](http://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/News/Documents/BITS-BATs-and-Buts.pdf); G. CUNIBERTI, *Rethinking International Commercial Arbitration. Towards Default Arbitration*, Cheltenham 2017.

<sup>18</sup> UNCITRAL Model Law on International Commercial Arbitration, Article 16.



cases, the courts do not get to pronounce the last word. Therefore, the decision of the arbitral tribunal on its own jurisdiction is final and binding – *i.e.* there are no challenges, there is nothing for the court to decide. Consequently, State courts and classical PrIL are maybe relevant, but only marginally so.<sup>19</sup>

Concerning the applicable law, arbitral tribunals may have the freedom to determine which rules of law are more appropriate to a specific case and may, in particular, directly apply non-State rules which are equally or better suited to resolve an international issue. The law that the arbitral tribunal applies to the dispute may depend on the parties' agreement. In the absence of such agreement, the current predominant trend in arbitration rules and acts is to allow the arbitral tribunal to apply the rules of law (and not *the* (national) law) which it finds more appropriate.<sup>20</sup> This evidences a mature PrIL which created a system to carve out undesirable results of the random choice of law rules roulette.

## **2. *Private Enforcement***

Quite paradoxically, States' pro-active policies and initiatives have been the key to reaching the current stage of arbitration autonomy. The word "State" not only refers here to any independent State acting individually by means of all its branches of power but also and notably refers to the collective action of States within international organisations. Actually, the success of modern arbitration is difficult to explain without the universal impact of United Nations instruments, elaborated in close collaboration with private institutions.<sup>21</sup> Without a doubt, this has helped private institutions to flourish in all corners of the globe, offering all kinds of dispute-settlement mechanisms often coupled with sets of private regulations.

---

<sup>19</sup> This paragraph is taken –with some modifications– from a debate with Giuditta CORDERO-MOSS, published in V. RUIZ ABOU-NIGM/ M.B. NOODT TAQUELA (eds.), *Diversity and Integration in Private International Law*, Edinburgh 2019 (forthcoming).

<sup>20</sup> For example, 2017 ICC Arbitration Rules, Article 21(1); 2018 Argentinian Act on International Commercial Arbitration, Article. 80.

<sup>21</sup> Namely, with the International Court of Arbitration of the International Chamber of Commerce. See C. LEMERCIER/ J. SGARD, *Arbitrage privé international et globalisation(s)*, [Rapport de recherche 11.11, Mission de Recherche Droit et Justice; CNRS; Sciences Po], Paris, 2015 (halshs-01158980).

Similarly, several initiatives have been developed or are currently ongoing within public settings dealing with different ways of private enforcement. Thus, with the adoption of the (Singapore) Convention and the Model Law on international settlement agreements resulting from mediation, UNCITRAL is trying to foster international mediation clearly inspired by its success with international arbitration.<sup>22</sup> It is true that both the New York Convention and the Singapore Convention provide for a mechanism of public enforcement of private agreements and decisions. However, it seems clear that parties know the general rule in application of the New York Convention pursuant to which their arbitration agreements and the resulting awards rendered should be enforced. This forces them to comply with the obligations arising from such agreements and awards. Drafters of the Singapore Convention are probably expecting a similar outcome.<sup>23</sup>

Not less interesting is the effort of the Hague Conference on Private International Law to set up a framework to promote the effectiveness of family agreements.<sup>24</sup> In fact, family law is an ideal field for the progress of ADR and private/public co-operation. All in all, enforcement outside public realm or in co-operation therewith is becoming increasingly important in many areas.<sup>25</sup>

### III. Impact of Denationalisation of Adjudicative Power

The consequences and avenues for reflexion offered by the foregoing description are manifold. Some of them demonstrate the impact of denationalisation of jurisdictional power on the current configuration

---

<sup>22</sup> See T. SCHNABEL, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements, *Pepperdine DSLJ*, vol. 19-1, 2019, p. 1 *et seq.*

<sup>23</sup> *Ibid.*, p. 3.

<sup>24</sup> See Revised draft Practical Guide: Cross-border recognition and enforcement of agreements reached in the course of family matters involving children (4 January 2019). <https://assets.hcch.net/docs/97681b48-86bb-4af4-9ced-a42f58380f82.pdf>

<sup>25</sup> See the contributions by J. BASEDOW on the Multiple Facets of Law Enforcement and G.A. BERMAN on the Enforcement of Legal Norms Through Private Means, in N. ETCHEVERRY ESTRÁZULAS/ D.P. FERNÁNDEZ ARROYO (eds.), *Enforcement and Effectiveness of the Law*, Cham, 2018, p. 3 *et seq.* and p. 33 *et seq.*, respectively.

of PrIL. I will focus in particular on three aspects which are certainly intertwined: the insufficiency of State adjudication, the dependence of State courts on heteronomous bodies, and the role of State adjudicators as simple “controllers.”

## **A. Insufficiency of State Adjudication**

### **1. *The Shift of Jurisdictional Rationale in PrIL***

Historically, in the era of State centrality, PrIL was an expression of sovereignty; it was a prerogative of the States to regulate situations having a connection with their territory or their nationals. That was particularly noticeable in matters of jurisdiction.<sup>26</sup> Today, the approach is (or, rather, should be) different; jurisdiction is not (exclusively) seen as a State prerogative, but rather as a function to ensure an effective access to justice. A part of this assumption is all but new: already the old institution of *forum non conveniens* and – more clearly – not so old institution of *forum necessitatis* are (or, again, should be) similarly based on this rationale. Constructions on civil universal jurisdiction also tend to pursue this direction.<sup>27</sup> Thus, the *fundamental* character of the right to access to justice becomes the main jurisdictional basis,<sup>28</sup> with an obvious extension to the right to enforcement.<sup>29</sup> As a result of this rationale, it becomes evident that State courts cannot *fully solve all* PrIL disputes. Even in disputes for which State-court jurisdiction is generally available, only a different court, with a recognised supranational authority, can properly decide if a State has violated human rights in adjudicating PrIL disputes.

Arguably, in certain cases, even the primary jurisdiction should be allocated to international courts. In fact, whenever the disputes in

---

<sup>26</sup> In this respect, the expression “sovereignty principle” has been used. E. PATAUT, *Principe de souveraineté et conflits de juridictions (Étude de droit international privé)*, Paris, 1999. But see, A. MILLS, Rethinking Jurisdiction in International Law, *The British Yearbook of International Law* 2014, p. 1 *et seq.*

<sup>27</sup> Among many other examples, see the multitude of comments on USSC, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (17 April 2013). See also Andreas BUCHER, La compétence universelle civile, *Recueil des Cours* 372 (2014), p. 9 *et seq.*

<sup>28</sup> This is rationale underlying, for instance, the ASADIP Principles on Transnational Access to Justice (TRANSJUS), <http://www.asadip.org/v2/wp-content/uploads/2018/08/ASADIP-TRANSJUS-EN-FINAL18.pdf>

<sup>29</sup> See *infra* III.C.1.

a particular field yield unsatisfactory answers in domestic courts (and, in some cases, also in international arbitration), proposals aiming to create international courts arise.<sup>30</sup>

No less significant are matters for which State courts have appeared to be – from a general point of view – ill-equipped in comparison with private adjudicators. Such a statement must not be interpreted as confirming the erroneous view according to which the peak of international arbitration is mainly due to the flaws of State jurisdictions. The reason for the success of arbitration is simply that the actors of international commerce perceive arbitration, because of its very nature, as more fitted to efficiently settle their disputes. But this is not an inference regarding the qualities of State courts. As a matter of fact, an observation of the practice of the last forty years offers evidence that arbitration works better in States whose courts are deemed –generally speaking– to be reliable. Surveys and the general impression seem to demonstrate that arbitration has become the real natural forum for a vast range of disputes, namely of a commercial nature. This is confirmed by the creation of arbitral institutions specialised in a variety of fields such as sports, finance, maritime law, art, *etc.*

Even in relation to the much criticised investor-State dispute settlement (ISDS), a return to the “original” jurisdiction of State courts does not appear to be a real option. Indeed, taking as a starting point, the institutionalisation of this mechanism within the framework of the World Bank more than half a century ago, it is hard to sustain that State courts would remain the best fora to solve investment disputes involving States. Now, after the so-called backlash against ISDS, the proposals to overcome its detected flaws include: the creation of (one or several) multilateral courts, a mix

---

<sup>30</sup> See, for instance, looking for the “missing forum” in issues related to corporate social responsibility, M. STEINITZ, *The Case for an International Court of Civil Justice*, Cambridge, 2019. The interest in this matter is out of doubt. The Draft International Convention on Business and Human Rights, adopted within the framework of the UN Human Rights Council is among many other complementary initiatives. See also H. VAN LOON, Principles and building blocks for a global legal framework for transnational civil litigation in environmental matters, *Uniform Law Review* 2018 (23-2), p. 298-318 (proposing to develop the PrIL component of the United Nations 2030 Agenda: Transforming Our World).

between arbitration and an appellate body, and the correction and improvement of the current arbitration system.<sup>31</sup>

There are many attractive avenues for research on arbitration as a mechanism to settle PrIL disputes. Even the much-visited topics of relations between arbitral tribunals and State courts still offer many points of interest.<sup>32</sup> Perhaps more useful in terms of contribution to the improvement of PrIL dispute-settlement is research about the feasibility and limits of promoting some features of arbitration in State adjudication (*e.g.* procedural flexibility and substantial *openness*) and the other way around (*e.g.* development of jurisprudence).

## ***2. The Attempt to Replicate Private Adjudication in State Courts***

The current trend –it is perhaps exaggerated to call it “proliferation”– to create State courts with specific competencies in international commercial matters, confirms the previous statements. States have seen that without specific courts operating under international-arbitration-like rules and mechanisms it is very hard to have cases submitted to their national courts. The national experiences present many differences, although some common features may be identified.<sup>33</sup>

These State courts are unlikely to eliminate the option of arbitration.<sup>34</sup> In the best scenario, commercial courts will act as concurrent fora, which, depending on the specific characteristics laid down by local regulation, might be especially appropriate for some type of disputes. For instance, they might be attractive for the settlement of disputes based on small claims, for which arbitration may appear too costly. Of course, the challenge for these courts is to

---

<sup>31</sup> See the documents of the UNCITRAL Working Group III, available on [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state)

<sup>32</sup> See A.S. RAU, *The Allocation of Power Between Arbitral Tribunals and State Courts*, *Recueil des cours*, t. 390 (2018), p. 9 *et seq.*

<sup>33</sup> P. BOOKMAN, *The Adjudication Business*, *Temple University Legal Studies Research Paper*, No. 2019-08 (19 February 2019). Available at SSRN: <https://ssrn.com/abstract=3338152>

<sup>34</sup> J. WALKER, *Specialised international courts: keeping arbitration on top of its game*, *Arbitration*, vol. 85-1, 2019, p. 2 *et seq.* Actually, taking London and New York experiences as precedents of the current trend, no risk for arbitration could be found.

become attractive for potential or actual disputing parties, not in comparison with arbitration but in general terms.<sup>35</sup>

The activity of international commercial courts is still incipient. More development is needed in order to draw firm conclusions regarding their effectiveness. Further research might be conducted concerning the phenomenon. In this respect, different perspectives have been suggested: historical, sociological and geopolitical, on a trans-disciplinary note, and, of a more specific legal character, issues related to “procedural culture” and to the potential incentive to forum shopping.<sup>36</sup> Perhaps it might also be interesting to research the conditions, the pros and cons, to propose national courts on other (non-commercial) international matters.

## **B. Dependence on Heteronomous Courts**

### ***1. State Courts within a Complex Jurisdictional Framework***

On many occasions, the decisions taken by State courts are nothing but the application of the adjudicative principles established by international courts. I have referred to this situation as one of “dependence,” although, in some cases there is technically no such thing. It might be more appropriate to label this phenomenon: the integration of the State court in a supranational jurisdictional structure. It is the typical case of the EU, in which Member-State courts are courts of the EU or, in other words, the first courts of EU law.

Beyond any technicality, as a matter of fact, it is worth highlighting that, in a number of States, domestic courts cannot adjudicate PrIL cases without applying the legal notions construed by the supranational courts. From the opposite perspective, one might say that there are many decisions of the latter which are binding on the former. The justifications for that situation vary.

Thus, human rights courts can be seen as the answer to the conundrum of a State acting simultaneously as a judge and a

---

<sup>35</sup> The paradigmatic Singapore International Commercial Court has already heard a number of cases (see <https://www.sicc.gov.sg/hearings-judgments/judgments>) but most of them have been transferred from the High Court.

<sup>36</sup> P. BOOKMAN (note \_), p. 52-54.

disputing party. In order to ensure the respect for human rights in civil proceedings and namely to grant international access to justice, a supplementary look from outside is often necessary. Similarly, supranational REIO courts are best suited to grant the application of the principles of the community of States given the obvious –and often understandable– contradictions of member States. REIO courts are also best placed to uniformly interpret REIO law, which is an essential goal for the proper functioning of the integration system.

From a prospective view, it is worth recalling the proposal to entrust the ICJ with an active role to interpret international instruments on PrIL matters. A concrete idea is to include an optional clause in PrIL conventions, on the basis of Article 36 of the ICJ's Statute, "providing that any State party to the convention recognises as compulsory, in relation to any other State party accepting the same obligation, the jurisdiction of the ICJ regarding the interpretation and application of the convention."<sup>37</sup>

## 2. *Different degrees of dependence*

As clear as the dependence of national courts from international ones may be, such dependence materialises in different ways and degrees. Thus, in some cases, the dependence appears as a *de jure*, mandatory requirement. Domestic courts cannot but defer to the "mandate" of the "superior" court. Within the framework of EU PrIL, such dependence has been emphasised in relation to certain English procedural tools,<sup>38</sup> sometimes bitterly.<sup>39</sup> Nevertheless, the impact of "superior" court's decisions on the State courts is sometimes moderated by a recognised margin of appreciation for the latter and the incrementalism developed by the former (as it is the case within the European System of Human Rights);<sup>40</sup> more generally, the balance between general mandates and concrete decisions is sought

---

<sup>37</sup> See, H. VAN LOON/ S. DE DYCKER (note 7), chap. III.

<sup>38</sup> Cases *Owusu* (C-281/02, on *forum non conveniens*) and *West Tankers* (C-185/07, on anti-suit injunction) have been particularly notorious in this respect.

<sup>39</sup> T.C. HARTLEY, *The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws*, *ICLQ* 2005 (54-4), p. 813-828.

<sup>40</sup> See J. GERARDS, *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, *Human Rights LR* 2018, 18-3, p. 495-515.

by the admission of the use of some proportional criteria.<sup>41</sup> In other words, the “mandate” may be one of principle that State courts accommodate to the particular facts of the concrete case.

In other situations, the dependence may affect the conduct of parties in legal disputes in the sense that something which was taken for granted is ultimately excluded because of a sudden change in the criteria followed so far by the “superior” court. The now infamous *Achmea* decision of the EUCJ<sup>42</sup> is illustrative in this regard: while the Courts’ finding concerns the incompatibility with EU law of ISDS in the particular intra-EU investment treaty context, the decision has raised some serious concerns for the future of commercial arbitration.

The different ways in which such dependence manifests itself concerning PrIL issues, the concrete impact of the dependence (which may include the necessity of legal reform), and the means for moderating that impact, are among the research topics that could be developed as regards the intervention of heteronomous courts in PrIL adjudication. Topics related to different aspects of the potential role of international courts (and namely the Court) in the “authentic” interpretation of the notion contained in PrIL conventions, could further be envisaged.

### C. State Adjudicators as Simple “Controllers”

#### 1. Concerning Foreign and International Courts’ Decisions

If the recognition and enforcement of foreign decisions were understood as the culmination of the exercise of the human right to effective access to justice, rather than as a mere courtesy of the State of enforcement, the power of the courts of this State “to control” those decisions would be somehow diminished.<sup>43</sup> This situation does

---

<sup>41</sup> For a general critical assesment, see A. MARZAL YETANO, *La dynamique du principe de proportionnalité*, Paris 2014.

<sup>42</sup> *Slowakische Republik v. Achmea BV*, C-284/16, 24 April 2018.

<sup>43</sup> See TRANSJUS, Article 7(1) “The extraterritorial effect of decisions is a fundamental right, closely related to the right to access to justice and fundamental due process rights. Therefore, judges and other State authorities shall always endeavor to favor the effect of foreign decisions when interpreting and applying the requirements those decisions are submitted to.” See, in a similar vein though within the European context, P. KINSCH, *Enforcement as a Fundamental Right*, *NIPR* 2014, p. 540-544.



not imply an “automaticity” of the enforcement of foreign decisions but a less strict scrutiny thereof. It goes without saying that I am referring to situations where no international instrument in matters of recognition applies. Conversely, several relevant instruments enable different kinds of “automatic” recognition, which makes the control of the foreign decision a superficial activity.

The long road walked by the Hague Conference on PrIL in order to design a general instrument regulating the recognition and enforcement of foreign judgments in civil and commercial matters, as well as the very content of the Convention,<sup>44</sup> shows how tough the traditional view on this issue remains to this day. Similarly, in some countries it is still difficult, if not impossible, to enforce a foreign judgment.<sup>45</sup> In others, the door to enforcement may only be opened thanks to an international instrument. All these features are well known. I however argue that, as resistant as the traditional view may be, it is incompatible with a notion of jurisdiction based on the fundamental right to effective access to justice.

In addition, the enforcement of international courts’ decisions further impacts the role of courts of the State of enforcement. As mentioned above, in some cases the “mandate” of the “superior” court is not susceptible to any control by “dependant” State courts.

## **2. *Concerning Arbitral Awards and Private Agreements***

Firstly it is crystal clear that the New York Convention has transformed international arbitration from a mere option for the settlement of international disputes into the prevalent option. More than that: the mere existence of the Convention –in force in 159 States– is sufficient to ensure compliance on a voluntary basis with an overwhelming majority of existing arbitral awards all over the world; that is, without any necessity of court intervention. Secondly, whenever a party seeks enforcement before a domestic court, the award is enforced in the vast majority of cases. That is to say that we have, in fact, a reduced number of cases in which parties go to courts

---

<sup>44</sup> At the conclusion of this contribution, the Diplomatic Session for the adoption of the Convention has not yet been held. I hence refer to the Draft Convention which is likely to be adopted without any significant changes.

<sup>45</sup> G. CUNIBERTI, *Le fondement de l’effet des jugements étrangers*, *Recueil des cours*, t. 394 (2018), p. 87 *et seq.*

to ask for the enforcement of an award. And the number of cases in which –maybe– “classic” private international law issues will arise are even fewer. Thirdly, one must mention the grounds for the refusal of enforcement or the challenge of an award, which are quite standardised due to the strong impact of the New York Convention. Lastly, the references of the Convention to traditional conflict of laws are explained by the historical context in which the Convention was adopted. Indeed, sixty years ago the State-centric conflicts paradigm was still prevalent in international arbitration (which had not yet entered into its modern era).

Although the specific requirements are different, the very structure adopted by Article V of the New York Convention is replicated in Article 5 of the 2019 Singapore Convention on International Settlement Agreements Resulting from Mediation. Concretely, a request for relief may only be refused by the competent authority if the opposing party demonstrates that one of the grounds included in Article 5(1) is present. Similarly, the competent authority may refuse to grant relief on its own motion on public policy grounds or where the subject matter of the dispute cannot be settled by mediation.

As regards ISDS awards rendered within the framework of ICSID, it is well known that Art. 54(1) of the ICSID Convention orders a direct enforcement of the pecuniary obligations imposed by the award within the territory of each contracting State “as if it were a final judgment of a court in that State.” This provision may seem a minor annoyance in a discourse on the denationalisation of PrIL but it is not. Firstly, many ICSID awards involve PrIL aspects. Secondly, there is a *de facto* exclusive arbitral jurisdiction on this matter. Thirdly, ICSID arbitration represents roughly more than 60% of the settlement of disputes between investors and States. And fourthly, the ICSID Convention has been signed by 163 States and is in force in 154 of them.<sup>46</sup> Furthermore, letting aside some initiatives to eliminate any kind of dispute settlement mechanism between investors and States, the proposals for the reform of ISDS, as well as the majority of the instruments recently concluded –even those relying on the creation of international courts– include the direct enforcement of international decisions in the contracting States.<sup>47</sup>

---

<sup>46</sup> <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>

<sup>47</sup> <https://investmentpolicyhubold.unctad.org/IIA/MostRecentTreaties#iiaInnerMenu>

All this shows that the national character of enforcement, as far as arbitration is at stake, is rather formal. In reality, the enforcers are mostly the private parties involved in the arbitration. Within this context, a topic for further analysis would be to consider the extent to which private enforcers must comply with public requirements, such as the conformity with international public policy.

#### **IV. A Word in Conclusion – Content and Teaching of PrIL**

The era of a PrIL built on the *exclusive* foundations of the State is irremediably over. More than that: it can hardly be argued that the State is always the *centre* of the entire PrIL structure. That may be the case for some specific issues but regarding others the role of the State is at most peripheral. The fabrication and the enforcement, as well as, ultimately, the effectiveness of PrIL considerably depend on different kinds of non-State actors. Specifically, notwithstanding the harsh criticism vis-à-vis arbitration and its legitimacy, arbitration is likely to keep its prominent role in PrIL for long time.

As obvious as the impact of the foregoing is, PrIL scholarship –both in books and in university courses– remains largely attached to the State-centric paradigm. In this way, a considerable part of real PrIL is kept out of specialists' discussions and far from newcomers' access. This is a regrettable source of misunderstandings.

The application of soft law to international relationships and non-State adjudication are both parts of PrIL with an ever growing significance. There is no valid justification for neglecting the latter and considering it as a mere external element which may only eventually have an impact on PrIL. Accordingly, proposals to approach the future evolution of PrIL as a tool to foster global governance (as the efforts for linking PrIL with the UN 2030 Agenda) should not ignore the fundamental role of private adjudication and private enforcement.